

The New Conflict Rules of Arbitration Agreements in China: The Old Wine in the New Bottle

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Abstract:

Before the enactment of the CPIL and issuance of Interpretation I of the CPIL, the conflict rules of arbitration agreements were contained in the Interpretation 2006 in China. But the new conflict rules are almost the same as those under the old legal regime and will also result in the wide application of the *lex fori*, which accordingly leads to many arbitration agreements being held invalid by the Chinese courts. Therefore, the author argues that the new conflict rules are nothing but the old wine in the new bottle. For the sound development of arbitration in China, the author suggests that in future the conflict rules of arbitration agreements be amended to keep consistent with those in the New York Convention and the application of the *lex fori* be restricted due to the strict requirement of a valid arbitration agreement in China. Of course, the best option is to repeal the strict requirement of a valid arbitration agreement in the CAL.

Key Words: Conflict rules; Arbitration agreements; Interpretation 2006; CPIL; Reform

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1. INTRODUCTION

Arbitration agreements play a significant role throughout the arbitration process which is often described as the backbone or the supporting pillar of arbitration. The validity of an arbitration agreement can be directly determinative with regard to the arbitral tribunal's jurisdiction, the circumstances in which the arbitral award can be challenged, as well as with regard to matters of recognition and enforcement. Therefore, the determination of its validity has always been the main concern for the legislatures, judges and practitioners, particularly in China, where the issue has become one of the hot topics in the foreign-related civil and commercial trial. In most cases, the validity of an arbitration agreement with foreign elements is determined by reference to the applicable law designated by the conflict rules. But unfortunately there were no such conflict rules in China since the enactment of the Chinese Arbitration Law (CAL) in 1995 until the Supreme People's Court (SPC) issued its Judicial Interpretation on the Application of the CAL in 2006 (Interpretation 2006) which has the nature of quasi-legislation since its publication. Subsequently, the conflict rules contained in Interpretation 2006 was replaced by the conflict rules in Art.18 of the Law on the Application of Laws to Foreign-related Civil Matters (CPIL) in 2011 and in Art.14 of the SPC's First Judicial Interpretation of the CPIL (Interpretation I of the CPIL) in 2013. This article first examines the evolution of the conflict rules of arbitration agreements in China until Interpretation 2006, then analyses the conflict rules contained in the CPIL and Interpretation I of the CPIL and makes a comparison between the new legal regime and the old one, in the following the author discusses some of the judicial practices relating to the determination of the validity of arbitration agreements under the new legal regime, and finally the author puts forward some suggestions to improve the conflict rules of arbitration agreements in China on the basis of the legal development worldwide.

2. EVOLUTION OF THE CONFLICT RULES OF ARBITRATION AGREEMENTS IN CHINA

According to the doctrine of separability, an arbitration agreement is independent and autonomous from the main contract, and thus has its own applicable law to determine its validity and effectiveness. The Arbitration Law of the People's Republic of China (CAL), effective as of September 1, 1995, incorporated such a doctrine,¹ however it did not make any explicit provision with regard to the applicable law. In early cases, the People's Court simply applied Chinese law (*lex fori*) to determine the validity of a foreign-related arbitration agreement; in consequence, many arbitration agreements were held invalid under the strict requirements of the CAL. According to Art.16 of the CAL, an arbitration agreement shall include: the expression of the intention to arbitrate, the subject matter to be arbitrated, and the arbitral institution designated by the parties. Otherwise, the arbitration agreement will be held invalid by the People's Court. In most arbitration laws in other jurisdictions, there is no

¹ CAL, art. 19.

requirement for the designation of an arbitral institution for the arbitration agreement to be valid.

In the 1995 case of *Novo Nordisk*,² for example, the contract between the parties included the following arbitration clause:

"All disputes arising out of or connected with the contract shall be settled through arbitration according to the ICC rules in effect at the time of applying for arbitration. Arbitration shall proceed in London. The arbitral award is final and binding for both parties."

The High People's Court ("HPC") of Hainan Province determined that the arbitration clause was invalid according to the CAL, and proceeded to report the case to the Supreme People's Court ("SPC"), pursuant to the pre-reporting system.³ The SPC, in its 1996 Reply, confirmed the decision of the HPC of Hainan Province that the arbitration agreement was invalid due to its failure to designate an arbitral institution, notwithstanding that the agreement met the other CAL requirements since it stipulated an express intention to arbitrate, the subject matter, the seat of arbitration and the applicable arbitration rules. It is clear that the SPC based its Reply directly on the provisions of Art. 16 of the CAL, without considering any choice of law of the arbitration agreement in question.

Fortunately, the SPC shifted its attitude in 1999 in its Reply to the Report from the HPC of Hubei Province as to the validity of the arbitration agreement in *Mitsubishi Commercial Ltd. (Hong Kong) v Three Gorges Investment Ltd.* In this case, the parties had stipulated in their contract that any disputes should be arbitrated in Hong Kong under the ICC rules; since this arbitral clause was valid pursuant to the Hong Kong law, the SPC held that it was valid and

² Fajing (1996) No.449.

³ Due to the lack of experience of the people's court in dealing with the cases concerning the validity of foreign-related arbitration agreement and the prevalent view among the people's courts that confirming the validity of the arbitration agreement will leave the case to the court of the seat of arbitration and thus will prejudice the judicial sovereignty of China, the people's courts will often simply rule that the arbitration agreement is invalid, and then it will accept the action on the merit of the dispute covered by the arbitration agreement brought by one of the parties. In order to avoid such reckless rulings made by the people's court denying the validity of the arbitration agreement, the SPC adopted a prior-reporting system as early as in August 1995, just before the enactment of the CAL. The system works as the following: the Intermediate People's Court ("IPC") shall report to the HPC whose jurisdiction it is within for a review of its determination that the arbitration agreement is invalid before it decides to accept the claim related to a foreign country, Hong Kong, Macao or Taiwan region covered by the said arbitration agreement according to its above determination; if the HPC in its review regards the claim can be accepted, it shall submit its opinion to the SPC. The IPC shall not accept the claim until the SPC has given its reply that the said arbitration agreement is invalid. If the IPC finds the arbitration agreement valid and dismisses the merits of a dispute, it is unnecessary to make a report to the higher people's court. The purpose of setting up such a system is to avoid the local protectionism and the intervention from the local government, and ensure that the arbitration agreement will not be held invalid recklessly by the lower people's court. Whereas, because there is no specific deadline for this system, it will cause much delay in determining the validity of arbitration agreements and will eventually affect the process of the arbitration. Even if the prior-reporting system works well, it is still unavoidable that so many arbitration agreements will still be held invalid due to the defects in the CAL and the Interpretation 2006.

capable of being performed.⁴ However, the SPC failed to develop a conclusive set of choice of law rules of arbitration agreements in this case, and in subsequent Replies to the different HPC's concerning the validity of arbitration agreements, it continued to make decisions in accordance with the CAL.

The situation changed in the SPC's Reply of July 16, 2002, regarding the validity of the arbitration agreement in *Hong Kong Yunwei Shipping Agency Ltd. v Shenzhen Tea Import and Export Company*.⁵ The SPC made it clear in this Reply that the law applicable to the validity of an arbitration agreement shall be the law chosen by the parties. In the absence of such a choice by the parties, the law of the seat of arbitration (*lex arbitrii*) shall apply; where there is neither choice of law nor an agreed seat of arbitration, or where the seat of arbitration is unclear, the *lex fori* (i.e. the Chinese law) shall apply. This practice was confirmed by the Second National Meeting on Foreign-Related Civil and Commercial Trials, held in China in November 2005, being recorded in the meeting minutes, which were subsequently sent to the People's Courts competent to hear foreign-related cases, for reference purposes. The SPC's subsequent Interpretation on the Application of the CAL, which came into effect on September 8, 2006, ("Interpretation 2006"), completely adopted such a practice, although there are some slight differences in the wording of the Interpretation 2006 as compared to that recorded in the meeting minutes.

The choice of law rule contained in the Interpretation 2006 is essentially consistent with Art. V(1)(a) of the 1958 New York Convention,⁶ to which China became party in 1986. Article 16 of the Interpretation 2006 provided that the validity of a foreign-related arbitration agreement shall be governed by the law chosen by the parties; in case the parties made no such choice but stipulated the seat of arbitration, then the *lex arbitrii* shall apply; in case the parties chose neither the applicable law nor the seat of arbitration, or the seat of arbitration was difficult to identify, then the *lex fori* shall apply. Generally, courts in China will follow such a rule in determining the validity of arbitration agreements, although some courts have deviated from this practice at times. The question arises, however, whether recourse to the *lex fori* (i.e. the Chinese law in general and the CAL in particular) is appropriate in cases where there is no choice of law or as to the seat of arbitration, or where the seat of arbitration is uncertain, given that most, if not all, defective arbitration agreements will be held invalid under the strict requirements of Art. 16 of the CAL.

For example, such a scenario can be well illustrated in the case of *Davis-Standard Corporation v Ningbo Xiecheng Electric Wire Ltd.*, in which the parties provided the following arbitration clause in their contract:

⁴ The SPC Fajing (1999) No. 143.

⁵ Minsi tazi [2002] No.18.

⁶ Art. V(1)(a) provides a conflict of law rule to determine the law governing an arbitration agreement by referring to the law chosen by the parties or, in the absence of such a choice, to that of the country where the award was made (usually the seat of arbitration).

"All disputes relating to the contract or occurring during the performance of the contract shall be settled by amicable consultation. In failure of this, all disputes shall be submitted for arbitration. The arbitration shall proceed in a neutral state which should be a WTO member agreed upon by both parties. The losing party shall bear the arbitration costs."

However, the parties did not stipulate the governing law of the arbitral clause, nor the seat of arbitration. The People's Court ruled that the *lex fori* should apply, and accordingly it found the arbitral clause invalid under Art. 16 of the CAL.⁷ In another similar case, the parties provided in their sales contract that all disputes in the performance of the contract should be settled through amicable consultation, failing which they should be submitted to a third country for arbitration. There was no choice of law or choice as to the seat of arbitration, therefore, the People's Court applied the Chinese law, and in doing so found the arbitral clause invalid.⁸ Under such a practice, it is straightforward for the People's Court to determine the law and apply the *lex fori*, nevertheless, the parties must face the fact that their expectations with regard to arbitration will be frustrated by any negligence or carelessness they exhibited in drafting the arbitration agreement.

3. THE CURRENT CONFLICT RULES OF ARBITRATION AGREEMENTS IN THE NEW CPIL: THE OLD WINE IN THE NEW BOTTLE

On October 28, 2010, the 17th Session of the eleventh Standing Committee of the National People's Congress adopted the the Law on the Application of Laws to Foreign Related Civil Matters (CPIL) which came into effect on April 1, 2011. Art. 18 of the newly promulgated CPIL provides the choice of law rules of the arbitration agreements, which simply reads: "The parties may choose the law applicable to their arbitration agreement by agreement. Where there is no such choice, the law of the place where the arbitral institution locates or the law of the seat of arbitration shall apply". At the first glance, this provision in the new act is nothing but the old wine in the new bottle. It adds some puzzlement instead of providing a clear guidance to the past practice in China.

Pursuant to article 18 of the CPIL, the parties to a dispute can choose the law applicable to their arbitration agreement; absent such choice, the *lex arbitrii* or the law of the place where the arbitration institutions locate may apply. If the parties have chosen the applicable law of their arbitration agreements, the situation is just the same as that under the Interpretation 2006; the parties' choice will be respected and the validity of the arbitration agreement will be determined according to the chosen law.

⁷ The SPC Reply to the Enquiry from the HPC of Zhejiang Province about the Denial of the Validity of the Arbitration Agreement in *Davis Standard Corporation v Ningbo Electricity Co. Ltd.*, [2004] minsi tazi No.13.

⁸ The SPC Reply to the Enquiry from the HPC of Sichuan Province about the Validity of the Arbitration Agreement in *Sichuan Huahong International Economic Technology Investment Ltd. v Huanhua Co. Ltd.* (South Korea), [2007] minsi tazi No.13.

The reality is that in most cases the parties or even the lawyers often forget to or may not think of designating a law to their arbitration agreements and they can not be expected to have this in mind in concluding or drafting the clauses of their contracts soon in future. Different from the subsidiary connecting factors in the Interpretation 2006, Art. 18 of the CPIL adopted the alternative connecting factors. The legislators perhaps intend to bring flexibility to the choice of law of arbitration agreements. Nevertheless, the alternative connecting factors in the new act will cause more uncertainty.

Where the parties do not choose the applicable law but stipulate the seat of the arbitration or the arbitration institution, then the validity of the arbitration agreement will be determined according to the *lex arbitrii* or the law of the place where the arbitration institution locates. Judging from the above analysis, to keep their arbitration agreements valid, the parties had better choose the *lex causae* other than the Chinese law or a seat of arbitration outside Mainland China. Another situation will arise under the new act, namely, the parties stipulate both the seat of arbitration and the arbitral institution in their agreements. For example, the parties provided in their contract that the disputes arising therefrom should be arbitrated by the CIETAC in France. If the arbitration laws in China and France contain contrary provisions on the validity of the arbitration agreement and the dispute concerning the validity of the arbitration agreement was put forward in a Chinese court, then what will the Chinese court do? If the legislators intend that the law which makes the arbitration agreement valid shall apply, they had better make it clear.

Perhaps the legislators realized that reference to the *lex fori* in the Interpretation 2006 often causes the arbitration agreements invalid, therefore, the *lex fori* as the last resort for determining the validity of the arbitration agreements was omitted in Art. 18 of the CPIL. But the question still arises: if the parties do not choose the applicable law, neither do they stipulate the seat of arbitration nor the arbitration institution, then which law will the court apply in such a situation? It may be argued that in such a case the law applicable to the arbitration agreements should be the law which has the closest relationship with the arbitration agreements in terms of Art. 2 of the CPIL.⁹ But the question follows: how is the closest relationship determined in such a situation? So far, such questions have not appeared under the new act. Definitely, these above questions need the judicial interpretation in the future.

As a response to such dilemmas, the SPC issued Interpretation I of the CPIL on December 10, 2012, which has come into effect as of 7 January 2013, with a new provision on the choice of law of arbitration agreements. Article 14 of Interpretation (I) provides that where the parties neither choose the law applicable to their arbitration agreements nor designate the arbitral institution or the seat of arbitration, or their designation is unclear or can not be ascertained, the Chinese courts may apply the Chinese law to determine the validity of the arbitration

⁹ Paragraph 2 of article 2 of the CPIL provides that "where this law (CPIL) and the other laws have no provisions on the choice of law of a civil matter, then the applicable law shall be the law which has the closest relationship with the civil matter".

agreement. Obviously, the new provision still cannot resolve the dilemma arising out of the conflict between the *lex arbitrii* and the law of the place where the arbitral institution locates, neither can it avoid the application of the strict requirements in the Chinese law in determining the validity of the arbitration agreement just as before.

The question of the validity of an arbitration agreement typically arises in three situations: at the beginning of the proceeding, where one of the parties resists arbitration; at the stage of setting aside; and at the stage of enforcement. The conflict rule in the New York Convention will only come to play at the enforcement stage and in the enforcing jurisdiction, however some other national¹⁰ and international¹¹ legislation adopt similar conflict rules to determine the validity of an arbitration agreement at the beginning of the proceeding or at the setting aside stage. If national courts adopt the same conflict rule as contained in the New York Convention, the arbitral award will not be denied recognition and enforcement at the enforcement stage.

We must note that under such a regime the seat of arbitration may be determined with absolute certainty at the enforcement stage; it will therefore be easy to ascertain the *lex arbitrii*, even in the absence of a choice made by the parties. However, at the beginning of the proceeding, where one of the parties resists arbitration, the seat of arbitration is often uncertain or the parties may have failed to specify it at all. In such a circumstance, we must question whether it is desirable for the People's Court to resort to the *lex fori* (the Chinese law), under which we have demonstrated that many of the defective arbitration agreements will be found invalid.

In addition, recourse to the *lex fori* will unavoidably increase the risk of forum shopping by prospective defendants seeking to avoid arbitration by litigating before the national courts which will be most likely to declare invalidity of an arbitration agreement based on its *lex fori*.¹² In fact, when a dispute arises, the Chinese party of an international transaction often brings action in the People's Court, irrespective of the terms of the arbitration agreement, and indeed most 'pathological' arbitration agreements are ruled invalid under the current mechanism.

4. A SURVEY OF THE JUDICIAL PRACTICE UNDER THE CURRENT LEGAL REGIME

Since the promulgation of the CPIL and the issuance of the Interpretation I of the CPIL, the Chinese courts have accepted many cases dealing with the validity of the foreign-related arbitration agreements. In most, if not all, cases the Chinese courts determine such validity in compliance with the provisions in Art.18 of the CPIL and Art.14 of Interpretation I of the CPIL.

¹⁰ Such as the arbitration laws in Sweden and Germany, see Klaus Peter Berger, The Arbitration Agreement under the Swedish 1999 Arbitration Act and the German 1998 Arbitration Act, vol.17, No.4, *Arbitration International* (2001) 392-393.

¹¹ Such as art. 34 (2) (a)(i) of the Model Law (as revised 2006); Art. VI(2)(a) and (b) of the European Convention on International Commercial Arbitration.

¹² Milo Molfa, Pathological Arbitration Clauses and the Conflict of Laws, 37 *Hong Kong Law Journal* (2007) 168.

As demonstrated in the following cases, the results of the cases under the current legal regime are almost the same as the cases dealt with under the previous provisions,¹³ which may also illustrate that the new provisions in the CPIL and Interpretation I of the CPIL are in essence not different from those contained in the Interpretation 2006; they are just the old wine in the new bottle.

If the parties have chosen the law to govern their arbitration agreement, though very rare in practice, the People's Court will respect that choice and decide the validity of the agreement according to that law. The parties can make such a choice at the conclusion of the arbitration agreement, or alternatively at any time before the end of the first oral hearing in the People's Court.¹⁴ For example, in the dispute over the validity of arbitration agreements between Beijing Huaxing Yuanda International Technology Ltd and Super Sonic Imagine SA, a company incorporated in France, the No.2 Intermediate People's Court of Beijing ruled that since both parties have stipulated in their exclusive distribution agreement that all the disputes relating to the interpretation, performance and breach of the agreement should be resolved under the French law, therefore, the validity of the the arbitral clause in the agreement which provides arbitration in Paris should be determined in terms of the French law. The court finally held that the arbitral clause was valid according to the relevant provisions in the French Civil Procedural Code provided by the respondent.¹⁵ Though the court in this case confused the law applicable to the underlying contract and the law applicable to the arbitration agreement, it showed its willingness to apply the law chosen by the parties to determine the validity of arbitration agreements pursuant to Art.18 of the CPIL.

Where the parties have made no choice about the law applicable to their arbitration agreement but have specified the seat of arbitration or the arbitral institution, the People's Court will apply the law of the seat of arbitration or the law of the place where the arbitral institution locates to determine the validity of the arbitration agreement. In a case accepted by the Dalian Intermediate People's Court, a Chinese grain manufacturing company and a company from North Dakota, USA, provided the following clause in their sales contract: "GOVERNING RULES:GAFTA 89/23 COMBINED LONDON 125 ARBITRATION IF NECESSARY." The court held that the seat of arbitration should be understood as in London, therefore, the validity of the arbitral clause should be determined according to English law under Art.18 of the CPIL.¹⁶ In another case, both parties stipulated in their stock purchase agreement that "any dispute arising from or in connection with this contract shall be submitted to the Shanghai Branch of China International Economic and Trade Arbitration Commission (CIETAC) for

¹³ For the analysis of the cases dealt with under the previous provisions, see Zhu Weidong, Determining the Validity of Arbitration Agreements in China: Towards a New Approach, 6 Asian International Arbitration Journal (2010) 53-55.

¹⁴ Art. 4 of the SPC Provisions on the Choice of Law in the Foreign-Related Civil and Commercial Contractual Disputes, which came into effect on 8 August, 2007.

¹⁵No.2, Intermediate People's Court of Beijing, (2013) erzhong min tezi No. 11200.

¹⁶ Dalian Intermediate People's Court, (2015) dalian minsi chuzi No.24.

arbitration which shall be conducted in accordance with the CIETAC Shanghai arbitration rules in effect at the time of applying for arbitration”, thus, the No.2 Intermediate People’s Court of Shanghai applied the law of the place where the arbitral institution locates, namely the Chinese law in this case to determine whether the said arbitral clause is valid or not in light of Art.18 of the CPIL.¹⁷

If the seat of arbitration or the place of the arbitral institution is in China, it is easy for the People’s Court to apply the law, however if the seat of arbitration or the place of the arbitral institution is in another country, there is the practical difficulty of proving the foreign law. If the foreign law cannot be proved conclusively, it is still possible for the People’s Court to make reference to the Chinese law.¹⁸ Considering that under the strict provisions concerning the validity of arbitration agreements in the CAL, most defective arbitration agreements will be held invalid, this may damage the parties’ legitimate expectation to settle their disputes through arbitration.

In the above two cases, either the seat of arbitration or the arbitral institution is specified in the arbitral clause, so the courts had no difficulty in applying either the law of the seat of arbitration or the law of the place where the arbitral institution. But if the parties specify both the seat of arbitration and the arbitral institution in their arbitral agreement, what will the Chinese court do if the seat of arbitration and the arbitral institution locate in different jurisdictions, especially when the laws in both jurisdictions relating to the validity of arbitration agreement are contradictory just as the situation in the above hypothetical case which provides arbitration by CIETAC in Paris? So far, such a case has not appeared in the Chinese courts, but due to the inexperience of the Chinese parties in drafting the arbitration agreements, such a situation will definitely arise in future. It is therefore hoped that the Chinese courts will adopt the *in favorem* principle in such a situation, to apply the law which will render the arbitration agreement valid, so that the parties’ expectation to arbitrate will not be frustrated.

The question of which law applies to an arbitration agreement can be “even more complicated when the parties have not chosen a seat of arbitration or a governing law”.¹⁹ However, guidance can be found in the conflict rule in Art.14 of Interpretation I of the CPIL which is just a reproduction of Art.16 of Interpretation 2006, under which the People’s Court will directly apply the *lex fori*, namely, the Chinese law, especially the notorious Art. 16 of the CAL in such a circumstance. Obviously, under the new legal regime, many arbitration agreements in which the parties neither choose the applicable law nor the seat of arbitration or the arbitral institution will of course be held invalid by the Chinese courts by reference to Art.16 of the CAL, just as

¹⁷ No.2 Intermediate People’s Court of Shanghai, (2012) hu erzhong minren (zhongxie)zi No.5.

¹⁸ According to art. 10 of the CPIL, in case the foreign law can not be approved, the People’s Court shall apply the law of the PRC.

¹⁹ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press (2008) 68.

the situation under the old legal regime which also resulted in the application of Art.16 of the CAL.

Furthermore, the provisions of the jurisdiction over the validity of arbitration agreements in Interpretation 2006 also increase the possibility of the application of the *lex fori*, in particular Art.16 of the CAL. According to Interpretation 2006, the Intermediate People's Courts at the place where the arbitral institution is located, or where the arbitration agreement is concluded, or where the plaintiff or the defendant has his domicile, is competent to hear a case involving the validity of an arbitration agreement.²⁰ If one of the parties brings the merits of a dispute directly to the People's Court irrespective of the arbitration agreement, and the other party challenges the court's jurisdiction based on the arbitration agreement, there will be more People's Courts competent to decide the validity of the arbitration agreement.²¹ If the parties choose neither the governing law nor the seat of arbitration or the arbitral institution, or where the seat of arbitration or the arbitral institution is uncertain, the court will apply the *lex fori*, and in such a circumstance arbitration agreements will be held invalid.

5. CONCLUDING REMARKS

As can be seen from the above analysis, the newly promulgated provisions in the CPIL and Interpretation I of the CPIL are nothing but the old wine in the new bottle, causing more uncertainty and even contradictory results. Many arbitration agreements will still be held invalid under such a legal regime. Thus, the author proposes that the parties had better not choose the Chinese law as the *lex causae* of their arbitration agreements, or not choose the seat of arbitration or the arbitral institution in Mainland China in their arbitration agreements, to avoid the possibility of their arbitration agreements being held invalid due to the application of the Chinese law under the current legal regime. It is obvious that neither choice will be beneficial for the sound development of arbitration in China.

Considering the fact that the Chinese legislators have no intention to revise the CAL at present, the author suggests that the conflict rule approach to determine the validity of arbitration agreements should still be adopted but the conflict rules of arbitration agreements in China should be kept consistent with those in the New York Convention so that the arbitral award will not later be denied recognition and enforcement because of the arbitration agreement being held invalid under New York Convention. In addition, due to the contradictions and loopholes that the conflict rules contained in Art. 18 of the CPIL and Art.14 of Interpretation I of the CPIL may cause, the author proposes that they should be amended in future as the following: the law governing the arbitration agreement should be the law chosen by the parties, and in the absence

²⁰ Art. 12 (2) of the Interpretation 2006.

²¹ According to arts. 24, 25 and 29 of the Civil Procedure Law of the People's Republic of China, the People's Court of the plaintiff's domicile, or of the defendant's domicile, or the People's Court of the place where the contract is concluded or where it is performed or where the relevant property is attached, or the People's Court of the place where the tort occurred, may decide such a matter.

of such a choice, the law of the seat of arbitration; in the event that the parties neither choose the law nor specify the seat of arbitration, the law applicable to the underlying contract or the *lex fori* may apply, whichever is favorable to the validity of the arbitration agreement. The proposed amendment aims at restricting the wide application of the *lex fori* to determine the validity of arbitration agreements in the Chinese judicial practice, which have resulted in many arbitration agreements being held invalid only because the parties did not designate an arbitral institution in their arbitration agreement. Of course, if the CAL is revised in the future, especially when the requirement of designating an arbitral institution in the arbitration agreement for it to be valid in Art.16 of the CAL is repealed, it will no longer be necessary to restrict the application of the *lex fori* in China.